Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-841

CLAUDE H. SHEPHERD and EVA CHAPA SHEPHERD,

Petitioners,

—v.—

vs.

CIRO TREVINO, FRANK C. CHAMPION, and MARK W. WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

CLAUDE H. SHEPHERD and EVA CHAPA SHEPHERD,
Petitioners,

vs.

CIRO TREVINO, FRANK C. CHAMPION, and MARK W. WHITE,
Respondents.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Claude H. Shepherd and Eva Chapa Shepherd respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 575 F.2d 1110, and is set forth infra in the Appendix hereto at 1a.
The opinion of the District Court is set forth infra at 14a.

QUESTION PRESENTED

Whether a Texas law that authorizes the unconditional disenfranchisement of felons convicted in federal and other state courts, with no possibility of re-enfranchisement, even though Texas only conditionally disenfranchises felons convicted in Texas courts and routinely re-enfranchises them, violates the equal protection clause of the Constitution of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas Code of Criminal Procedure, article 42.12, §7:

> At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the Court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Article VI, §1 of the Texas Constitution, which provides in relevant part:

> The following classes of persons shall not be allowed to vote in this State, to wit:
>
> * * * *
>
> Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

Texas Election Code, article 5.01, which provides in relevant part:

> The following classes of persons shall not be allowed to vote in this state:
>
> * * * *
>
> 4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

STATEMENT OF THE CASE

Article VI, section 1 of the Texas Constitution disenfranchises "all persons convicted of any felony, subject to such exceptions as the legislature may make." The legislature has made such an exception by authorizing the re-enfranchisement of "those restored to full citizenship and right of suffrage or pardoned." Tex. Elec. Code Ann. art. 5.01 (Vernon). Article 42.12, section 7 of the Texas Code of Criminal Procedure implements this exception by providing a mechanism for restoring full citizenship and the right of suffrage for successful Texas state court felony probationers.[1/] No provision is made for restoring citizenship and suffrage for successful felony probationers from the federal or other state judicial systems.

Clause and Eva Shepherd, husband and wife, have each satisfactorily completed probation after being convicted of unrelated felony offenses in the United States District

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1/ Felons who have satisfactorily completed their terms of probation, and are thereby eligible for restoration of civil rights, including the right to vote, are hereinafter referred to as "successful felony probationers" or "ex-felons." See Richardson v. Ramirez, 418 U.S. 24, 27 (1974).

Court for the Southern District of Texas. Claude Shepherd, now 56 years old, was convicted of smuggling liquor and received an eighteen-month suspended sentence, with a five-year term of probation. Eva Shepherd, who is 65, was convicted in the same court of misappropriating postal funds, and placed on probation for five years. Because of exemplary behavior, each was discharged from probation early on the recommendation of a probation officer - Mr. Shepherd in 1966 and Mrs. Shepherd in 1970.

Thereafter, in 1975, pursuant to Texas law, respondents cancelled the Shepherds' voter certificates.

Each of the Shepherds had consistently voted in prior elections, and wishes to continue to vote for the state and federal officials who represent their interests.

Accordingly, the Shepherds brought this class action under 42 U.S.C. §1983, claiming that the Texas statutory scheme violated the equal protection clause by permanently and unconditionally disenfranchising them because they had been convicted in federal court, while providing a statutory mechanism under which Texas state felons could be restored to the franchise.

The Shepherds alleged that in Hidalgo County, where they reside, 90% of all probationers are successful, thereby becoming

eligible for the Texas re-enfranchisement procedure, and that those successful probationers are routinely (i.e., administratively, without the actual exercise of discretion) re-enfranchised. Complaint, ¶¶ XXV, XXIX.[2/] They further allege that, had they been convicted and probated in the Texas

2/ ¶ XXV: "Ninety percent of all individuals placed on probation in Hidalgo County, after being convicted of a felony in the Texas state courts, upon successful completion of probation, regain their civil rights, including the right to vote, using the above procedure [Article 42.12, Section 7]."

¶ XXIX: "Texas citizens convicted of felonies under state law may, and generally do, have their convictions set aside when they have been discharged from probation, and their right of suffrage restored."

Perhaps understandably, given its ambiguity, the Court of Appeals misinterpreted ¶XXV of the Complaint. See 575 F.2d at 1112, 1115 n. 6. The Court read it to allege that only 90% of successful probationers were re-enfranchised, whereas the Complaint should be understood to allege that 90% of all probationers are successful and that all of those who are successful are routinely re-enfranchised. Plaintiff's Affidavit in Support of Motion for Preliminary Injunction stated, "Had Plaintiff been so convicted and probated in the Texas system, their right to vote would have been automatically reinstated." Appendix in Appeal in the Fifth Circuit, No. 75-8-223 at 19, ¶4.

The routine, non-discretionary nature of the Texas procedure for re-enfranchisement of Texas felons appears clearly from the

(continued on next page)

system, their right to vote would have been routinely restored. Complaint, ¶¶ XXVI, XXIX.

The District Court, sua sponte, treated respondents' answer as a motion under Federal Rules of Civil Procedure 12(b)(6). Treating the allegations as true, the court nevertheless dismissed the suit for failure to state a claim. The Fifth Circuit affirmed. The Court reasoned that "the Court of conviction is in a peculiarly advantageous position to gauge the progress and rehabilitation of a convicted felon," and held that the Texas scheme was therefore rationally related to Texas' interest of limiting the franchise to responsible voters.[3/]

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form Order Discharging Defendant from Felony Probation, which appears in the Appendix infra at 26a. The recitals precedent to the signature of the court demonstrate that personal consideration of an ex-felon's character, record, or crime is not a factor governing the court's entry of the re-enfranchisement order.

3/ It bears emphasis that this case arises on the grant of a motion to dismiss, and that the petitioners have never had an opportunity to offer proof of the facts alleged, including the non-discretionary nature of the Texas re-enfranchisement procedures. Reversal of the decision below would not require a holding that the Texas procedure violated the equal protection clause of the Constitution, but rather a holding that plaintiff's have stated a good claim, and that they must be permitted an opportunity to prove to the district court that the Texas procedures are in fact impermissibly arbitrary.

REASONS FOR GRANTING WRIT

THE DECISION BELOW IS INCONSISTENT WITH O'BRIEN V. SKINNER AND OTHER DECISIONS OF THIS COURT BECAUSE IT AUTHORIZES TEXAS UNCONDITIONALLY TO DISENFRANCHISE FELONS CONVICTED IN FEDERAL AND OTHER STATE COURTS, WITH NO POSSIBILITY OF RE-ENFRANCHISEMENT, EVEN THOUGH TEXAS ONLY CONDITIONALLY DISENFRANCHISES FELONS CONVICTED IN TEXAS COURTS, WHO SUBSEQUENTLY ARE ROUTINELY RE-ENFRANCHISED.

In Richardson v. Ramirez, 418 U.S. 24 (1974), the Court held that states may disenfranchise ex-felons on an even-handed basis. The question presented here is whether a state may disenfranchise or re-enfranchise ex-felons on a wholly arbitrary basis, having no relation to the gravity of the crime charged or the circumstances under which it was committed, or any other legitimate state interests.

The classification challenged here penalizes all ex-felons throughout the nation who have been convicted in courts other than Texas courts by permanently taking from them the right to vote in state or federal elections in Texas. Whatever legitimate interests Texas may have in depriving felons or ex-felons of the right to vote, those interests are irrationally served by the rigid and extreme difference in treatment afforded federal and other state felons on the one hand, and Texas felons on the other.

This Court has protected citizens from wholly arbitrary deprivations of the right to vote even where such deprivations have been measured by less than strict scrutiny. O'Brien v. Skinner, 414 U.S. 524 (1974); Carrington v. Rash, 380 U.S. 89 (1965). In O'Brien, the Court struck down a New York statute under which two citizens awaiting criminal trial - one confined in his county of residence and one whose residence was in the adjoining county - received different treatment as to voting rights. The Court held that the New York law, which had been construed to permit only the non-resident detainee to vote, was unconstitutionally arbitrary.

The distinctions made by the Texas law challenged here are even more arbitrary.

A. Conflicting Definitions and Use of "Felony"

A felony in Texas law is defined very differently from federal law. The Texas Penal Code specifies particular offenses as felonies, none of which is punishable by terms of less than two years (Tex. Penal Code Ann., §12.31 et seq.). Under federal law, a felony is any offense punishable by a term exceeding one year (18 U.S.C. §1). Moreover, most federal felonies can be punished with terms less than two years. Other states, of course, have varying provisions.

Under the challenged Texas classifications, Texas has conclusively presumed that all persons convicted in Texas state courts to terms of less than two years are responsible voters. Only those sentenced to two years' or more imprisonment are disenfranchised, and even they are provided a procedure for routine re-enfranchisement, despite the length of the sentence actually imposed or the gravity of the crime. In contrast, persons convicted in federal courts of crimes punishable by a term of one year and a day, no matter what their actual sentence, are deemed irresponsible voters and are permanently disenfranchised.[4/] As applied to petitioner Claude Shepherd, Texas law has permanently disenfranchised him for his

4/ The possibility that petitioners may be restored to the vote by presidential pardon does not diminish the strength of their equal protection claim. All successful felons may be re-enfranchised through pardons; in addition, Texas felons are afforded a simple procedure under which they will routinely be re-enfranchised, a procedure wholly denied to felons convicted in other jurisdictions. Petitioners do not argue that the opportunities for re-enfranchisement must be precisely identical; their argument is that the gross disparity between the opportunities afforded here is so arbitrary as to violate the equal protection clause of the 14th Amendment, even when judged by the rational relation test.

federal felony conviction even though he would not have been disenfranchised at all if he had received the same sentence in a Texas court.

There is no rational justification for these anomalies.[5/] Presumably, federal (or other state) probationers with lesser sentences would make more responsible voters than Texas probationers with far longer sentences; at least, no explanation appears why they would not.

A second irrationality created by the use of "felony" is that some offenses are felonies in federal law but only misdemeanors

5/ The Court below suggested that the Texas courts "familiarity" with Texas' own convicts justified the classification. That argument is similar to New York's justification for effectively disenfranchising some, but not all, pre-trial detainees:

> "[T]hese handicaps...are functions of attendant impracticalities or contingencies...."

O'Brien v. Skinner, 414 U.S. 524, 528 (quoting 31 NY 2d 317, 320-21). The interest in limiting the franchise to "responsible voters" asserted by Texas has been effectively furthered by more than 42 states without unfairly discriminating against ex-felons who have been convicted in other state or federal jurisdictions. See infra, at nn. 13-19.

in the Texas code.[6] Other offenses can be either a felony or a misdemeanor in the federal system but are always misdemeanors in Texas.[7] At least one federal felony is not even a criminal offense in Texas.[8] Thus, Texas unconditionally withdraws the vote from those convicted in federal court of offenses that Texas has decided as a matter of state legislative policy should

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6/ For example, fraudulent bankruptcy and flight to avoid prosecution are federal felonies (18 USC §§ 151, 1073-74, but Texas misdemeanors (Tex. Penal Code Ann., §§ 32.34, 38.04 et seq). Harboring or concealing an arrested person is a federal felony (18 USC §1071), but only a Texas misdemeanor (Tex. Penal Code Ann., §38.05).

The highest courts of Minnesota and Oklahoma have held that conviction for federal felonies would not render a person ineligible to vote or to hold public office where the offense would be only a misdemeanor under state law. Arpagaus v. Todd, 226 Minn. 91, 29 N.W. 2d 810 (1947); Elder v. County Election Board, 326 P.2d 776 (Okla. Sup. Ct. 1958). But see Chavez v. Evans, 79 N.M. 579, 446 P.2d 445 (1968).

7/ For example, contempts, and extortions and threats are federal misdemeanors or felonies, depending upon the sentence (18 USC §§401, 872-76). In Texas, those crimes are misdemeanors(Tex.Stat.Ann. Art. 1911a), Tex. Penal Code Ann. §22.07).

8/ 18 USC §891, a federal felony involving credit transactions, has no counterpart at Texas criminal law. Violation of an analogous provision leads only to civil penalties (Tex. Bus. Com. Code §17.50).

not be felonies, and should not entail loss of the vote.

The arbitrary nature of Texas' voting classifications is especially evident with respect to federal felonies having Texas-law counterparts.

For example, if Claude Shepherd had been prosecuted under Texas law for smuggling liquor without paying state tax, rather than, as he was, for not paying federal tax, he could only have been convicted of a misdemeanor, and would not have been disenfranchised.[9]

B. Discretionary Choice of Jurisdiction for Prosecution

The Texas procedures which exclude federal felons from the opportunity to use the re-enfranchisement mechanism are also arbitrary because a person's future right to vote in Texas depends on the informal, arbitrary, unreviewable decision among prosecutors as to which jurisdiction will prosecute a crime that could have been charged under both federal and Texas law.

9/ See Tex. Stat. Ann., Art. 666-41. This offense has since been replaced by Tex. Alco. Bev. Code §1.05, also a misdemeanor.

Instances where a person may be charged by either the state or federal prosecutors (especially for offenses relating to duty taxes, liquor control, and minor drug possession), are particularly prevalent in Hidalgo County because of its border with Mexico. There are no formal procedures, nor even stated criteria, for determining which jurisdiction shall prosecute a person who could be charged by either jurisdiction for the same conduct. Only informal agreements between state and federal prosecutors govern these prosecutorial decisions.

Claude Shepherd could have been prosecuted for smuggling liquor without paying federal tax (a felony), or for not paying state tax (a misdemeanor). The discretionary decision to prosecute him under federal law effectively, and permanently denied him the franchise.

Numerous other examples exist. For example, second-time possession of less than four ounces of marijuana is a federal felony, but only a Texas misdemeanor. A person could be prosecuted in either jurisdiction for such an offense.

Like the happenstance factor of county of residence held in O'Brien to be an unconstitutionally arbitrary justification for permitting some pre-trial detainees to

vote and excluding others, a successful probationer's right to vote in Hidalgo County is a fortuitous event, often depending, as here, on the arbitrary decisions of state and federal prosecutors as to which will prosecute particular conduct. Even for ex-felons, the right to vote is too important to be dependent on such arbitrary factors.

C. Arbitrary Limitation of Re-enfranchisement to Texas Ex-Felons, and Refusal to Recognize Out-of-State Re-enfranchisement.

Although Texas provides a mechanism under which approximately 90% of its own felons in Hidalgo County are re-enfranchised, the opportunity for re-enfranchisement is wholly and permanently denied to the following residents in Texas: ex-felons convicted in federal courts, and ex-felons convicted in non-Texas state courts. So total is the disenfranchisement attendent on felony conviction that even a person convicted of a felony in another state who has been thereby disenfranchised and later lawfully re-enfranchised under the laws of that other state cannot vote in Texas. Texas considers the felony to be cause for permanent disenfranchisement, subject only to the Texas re-enfranchisement provisions, which are not available to such a person.

This discrimination in favor of persons whom Texas has itself convicted is as arbitrary and violative of the equal protection clause as the classification in favor of long-standing Tennessee voters struck down in Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement for voting). See also Shapiro v. Thompson, 394 U.S. 618 (1969) (durational residence requirement for welfare), and Oregon v. Mitchell, 400 U.S. 112, 237 (opinion of Brennan, White, and Marshall, JJ.), 285-286 (Stewart, Blackmun, JJ., and Burger, C.J., concurring) (congressional abolition of durational residence requirements for presidential elections sustained as enforcement of right to travel under §5 of the Fourteenth Amendment).

For those convicted of felonies outside Texas, the classification operates irrationally and arbitrarily to penalize the right to travel into and take up residence in Texas with the permanent loss of the right to vote in state and federal elections.[10/] Moreover, whereas the classification in Dunn was held to penalize travel into Tennessee in a constitutionally meaningful

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10/ More specifically, the right penalized is the opportunity to make use of the judicial procedure under which 90% of all Texas felons in Hidalgo County are routinely re-enfranchised.

sense even though petitioners were only temporarily deprived of the right to vote, the Texas classification permanently deprives non-Texas ex-felons who move into Texas of the right to vote.

Those who, like petitioners, reside in Texas and have been convicted in federal courts in Texas present the opposite side of the coin. Because they are not permitted to avail themselves of the statutory re-enfranchisement mechanism afforded ex-felons convicted in Texas courts, if they ever want to vote for their federal or state representatives, they must leave Texas and take up residence in a state which permits re-enfranchisement evenhandedly.[11/] The reasons advanced to justify Texas' arbitrary "preference" for its own felons are no more rational than the reasons advanced by Tennessee to justify the exclusion of new residents from voting, Dunn v. Blumstein, supra, or the reasons offered by Arizona for preferring long-resident welfare beneficiaries, Shapiro v. Thompson, supra, or those advanced by Texas to justify the exclusion of newly resident servicemen from the vote, Carrington v. Rash, supra.

11/ See infra, at n. 13-19.

Granting Texas' legitimate interest in limiting the franchise to responsible voters, that interest is not rationally advanced - it is not advanced at all - by Texas' exclusion of felons from other jurisdictions from its re-enfranchisement procedure.

1. The classification at issue is not justified by the "familiarity" of Texas courts with Texas felons.

The Court of Appeals advanced as a first justification for the Texas procedures the "familiarity with the individual defendant and his case which the court of conviction has." 575 F.2d at 1115. However, taking as true the allegations of the complaint, properly read,[12/] re-enfranchisement is routine, non-discretionary, and afforded as a matter of course to successful ex-felons in Hidalgo County. Accordingly, the state does not in fact rely on familiarity to justify its re-enfranchisement procedures.

But even assuming, arguendo, that (as the Court of Appeals believed) 10% of those eligible for re-enfranchisement were denied it, there is no support in the record for the "familiarity" argument. In addition, other states have found numerous methods

12/ See supra, at 6 n. 2.

other than "familiarity" for limiting re-enfranchisement to those deemed "responsible" without wholly excluding federal ex-felons from the opportunities afforded state felons for re-enfranchisement.

States which, like Texas, have furthered their interest in limiting the franchise to "responsible" voters by disenfranchisng ex-felons have done so, and provided in some cases for automatic or discretionary re-enfranchisement, in a wide variety of ways that do not unfairly discriminate against ex-felons convicted in other jurisdictions. More than twenty states provide for the automatic restoration of the right of all ex-felons to vote upon expiration of the maximum possible term, or upon completion of actual term of imprisonment, probation, or parole.[13/] Other states disenfranchise felons for a determinate period of time.[14/] Others

13/ See Note, "Restoring the Ex-Offender's Right to Vote: Background and Developments," 11 Amer. Crim. L. Rev. 721, 628 n. 661 (1973) [hereinafter Amer. Crim. Note]. See also Conn.Gen.Stat.Ann., §9-46a (West); Del.Code Ann. tit. XI, §4347; Fla. Stat. Ann. §940.05(2),(3); 1977 Mo.Legis.Serv. H.B. No. 101, §1 (Vernon)(effective Jan. 1, 1978); N.H. Rev.Stat.Ann. §607(A):5; Ohio Rev. Code Ann. §2961.01 (Page).

14/ Four states, plus the District of Columbia, deny offenders voting rights for a fixed period of time, without discriminating against ex-felons convicted in federal or other state jurisdictions. Amer.Crim.Note, at 729, 762-65, and 76 n. 224. See also Utah Const., art. IV, §6.

have chosen to disenfranchise some ex-felons permanently, and others for a determinate time, depending on the offense.[15/] Still other states do not disenfranchise any ex-felons,[16/] or any but the state's own ex-felons.[17/]

In states providing for discretionary administrative re-enfranchisement, the procedures apparently do not discriminate against felons from federal and other state jurisdictions.[18/] Even the two states having discretionary judicial re-enfranchisement provisions both afford federal felons the equal use of the mechanisms provided.[19/]

15/ Three states disenfranchise ex-felons permanently for certain specified crimes, and for a determinate period for others, without excluding federal or other state felons from the possibility of re-enfranchisement. Am.Crim.Note, at 729 n. 69.

16/ Four states do not deprive any ex-felons of the right to vote. Amer.Crim.Note, "The Need for Reform of Ex-Felon Disenfranchisement Laws," 83 Yale L.J. 500, 584 n. 19 (1974) [hereinafter Yale Note], at 582.

17/ S.D. Const. art. VII, §2.

18/ Ala. Code tit. 17, §310; D.C. Code Ann. §1-1102(7)(A); Ga.Code Ann. §77-528; Miss.Code §44-7-47; Neb. Rev.Stat. §29-112; R.I. Gen. Laws §13-6-2;

19/ [Please see next page for this footnote.]

In short, as the experience of all these states demonstrates, there are myriad ways to ensure the limitation of the franchise to responsible voters without creating the gross disparities, anomalies, and wholly arbitrary distinctions Texas has created. Holding Texas' arbitrary exclusion of federal and other state ex-felons from its routine re-enfranchisement mechanism violative of the the equal protection clause plainly need not prevent Texas from implementing its legitimate interest with a more even-handed approach.

2. The classification at issue is not justified by the possibility that federal courts or federal probation officers would fail to turn over information about federal probationers to the state.

The Court of Appeals also predicated the validity of the Texas scheme on the inability

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19/ Arizona and California both have judicial re-enfranchisement systems similar to the Texas provisions. Arizona has made explicit provision for restoration of federal felon's voting rights, Arizona Criminal Code, §§ 13-1742-45, 1753 (Supp. 1978). California's provisons are, in practice, afforded all ex-felons, whether or not convicted in California. See California Penal Code, §§ 1203.4, 4852.01 (West).

of a state court to compel federal probation officials to turn over information about federal probationers. 575 F.2d at 1115.

Again, there is no evidence in the record of any lack of federal-state cooperation. If assumptions are to be indulged, plainly the only reasonable assumption is one of very close cooperation among state and federal law enforcement agencies. They have long assisted each other's investigations, held one another's prisoners, and cooperated generally in furtherance of their mutual interest in law enforcement.

Moreover, to the extent that the complaint is properly read to allege that Texas ex-felons are routinely re-enfranchised, it is apparent that the only cooperation required would be the public recitation that probation was satisfactorily completed, a recitation already available from public records. In any event, the practice of numerous states of re-enfranchicing felons from other jurisdictions, not only automatically but discretionarily, plainly demonstrates that this justification, too, is wholly without substance.

CONCLUSION

Just as New York offered no rational justification in O'Brien v. Skinner, supra, for the exclusion of persons detained in jails in the county of their residence, but not those detained in other counties, from voting, Texas has offered no justification for routinely re-enfranchising its own felons, but arbitrarily excluding the following successful ex-felons from even being considered under its re-enfranchisement procedures:

(1) all residents who are successful federal felony probationers, including those successfully probated from a felony offense

which is not a felony under Texas law, and/or,

for which the punishment was not equivalent to a felony sentence under Texas law; and

(2) persons who are successful state felony probationers in another state, and who are or thereafter become Texas residents, including those successfully probated from an offense

which is not a felony in Texas, and/or, for which the punishment was not equivalent to a felony sentence in Texas, and/or, who were re-enfranchised under the laws of the state which had convicted them.

The decision below, holding that this crazy-quilt scheme does not violate the equal protection clause, cannot be reconciled with the analysis demanded by O'Brien. Surely the equal protection clause is not so toothless as to sanction Texas' wholesale and arbitrary discrimination against felons from other jurisdictions in favor of its own felons; the Court should review this case to make that clear.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*/ Counsel acknowledge the assistance of Michele Anderson, a third-year law student of the Boalt Hall School of Law, in the research and preparation of this brief.

APPENDIX

CLAUDE H. SHEPHERD and EVA CHAPA SHEPHERD, Plaintiffs-Appellants,

v.

CIRO TREVINO, Tax Assessor, Collector and Registrar of Hidalgo County, et al., Defendants-Appellees,

No. 76-3258

United States Court of Appeals,
Fifth Circuit

June 30, 1978.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK and GEE, Circuit Judges, and LYNNE,* District Judge.

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*Senior District Judge of the Northern District of Alabama, sitting by designation.

GEE, Circuit Judge:

Plaintiffs Claude and Eva Shepherd were convicted of separate felonies in federal court and, after satisfying the terms of probation, were discharged from the court's supervision. As a result of their convictions plaintiffs were automatically disenfranchised by the State of Texas. They brought this section 1983 suit on behalf of themselves and others similarly situated, challenging a Texas statute which provides a mechanism for the reenfranchisement of convicted state felons who satisfactorily complete the terms of their probation without providing a similar mechanism for the reenfranchisement of successful federal probationers. The plaintiffs claim that the statute violates the fourteenth amendment's equal protection clause.[1] The district court dismissed plaintiffs' suit for failure to state a claim. We affirm.

[1] The Texas Constitution disenfranchises all persons convicted of a felony "subject to such exceptions as the Legislature may make." Vernon's Ann. Tex. Const.

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1. In their complaint, plaintiffs also claimed the statute violated the Texas Constitution; however, they have not raised that claim before this court on appeal.

art. VI, §1.[2] The Texas statute implementing this constitutional provision stipulates that persons convicted of a felony may vote only if they have been "restored to full citizenship and right of suffrage, or pardoned." 9 V.A.T.S. Election Code art. 5.01[3] This statute applies to persons convicted of a felony in federal as well as state court. Hayes v. Williams, 341 F.Supp. 182, 188 (S.D. Tex. 1972). Art. 42.12, §7 of the Texas Code of Criminal Procedure directs the Texas state courts to discharge a convicted felon who has satisfactorily fulfilled the conditions of probation. Section 7 also empowers the state courts to set aside the conviction of a discharged felon and release him "from all penalties and disabilities" resulting from his conviction.[4]

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2. Art. VI, §1 of the Texas Constitution reads in part:

> The following classes of persons shall not be allowed to vote in this State, to wit:
>
> * * * * * *
>
> Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

3. Art. 5.01 reads, in relevant part:

> The following classes of persons shall not be allowed to vote in this state:
>
> * * * * *
>
> 4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

4. Vernon's Ann. Code of Ciminal Procedure, art. 42.12, §7, reads:

From these constitutional and statutory provisions emerges the Texas system for the disenfranchisement and reenfranchisement of convicted felons: (1) any person convicted of a felony in any court, state or federal, is automatically disenfranchised; (2) a person convicted of a felony in Texas state court and placed on probation may have

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At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the Court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

his conviction set aside and be reenfranchised by the court in which he was convicted, or he may be reenfranchised by gubernatorial pardon; (3) a person convicted of a felony in federal court may be restored to suffrage only by presidential pardon. This disparity in the means of reenfranchisement is the subject of plaintiffs' challenge. Plaintiffs contend that ninety percent of the successful state probationers in Hidalgo County are reenfranchised by the court in which they were convicted. Plaintiffs aver that they are successful federal probationers who reside in Hidalgo County. They claim that Texas' creation of a reenfranchisement scheme for state probationers but not for federal probationers violates the equal protection clause of the fourteenth amendment.

In Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), the Supreme Court held that a state has the power to disenfranchise persons convicted of a felony. The California system at issue in Richardson was similar to the Texas system involved here. Persons convicted of felonies were disenfranchised. If they actually served any time in prison, the convicted felons could be restored to the franchise only by executive pardon. However, a person convicted of a felony in state court and placed on probation could have his conviction set aside and his right to vote restored.

The plaintiffs in Richardson consisted of the class of ex-felons who had served

time in prison pursuant to their felony convictions and thus, under California law, could not vote. Although the Court's opinion never defines the comparison group, i.e., the group with which the plaintiffs were claiming to be similarly situated, the Court's analysis suggests that plaintiffs' claim went to the state's power to disenfranchise felons at all. Thus, the comparison group, by implication, must have been made up of those persons eligible to vote who were similar to the members of the plaintiff class except that they had never been convicted of a felony. Although the plaintiffs in Richardson could have challenged the disparity between the means of reenfranchisement available to convicted felons who served time in prison and convicted felons placed on probation, they did not do so. Nor does it appear that the plaintiffs raised this issue before the California Supreme Court. See Ramirez v. Brown, 9 Cal.3d 199, 107 Cal. Rptr. 137, 507 P.2d 1345 (1973). Thus, the only issue properly before the Court was whether a state could deny the franchise to persons convicted of a felony.

The plaintiffs in Richardson contended, as plaintiffs do here, that the state's abridgement of their right to vote triggered strict scrutiny. The Supreme Court distinguished plaintiffs' claim from other "right to vote" claims on the ground that section 2 of the fourteenth amendment specifically refers to the state's power to disenfranchise persons convicted of a felony. Section 2 reads:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

(Emphasis added.) After exploring the history and the adoption of section 2, the Court concluded that the disenfranchisement of convicted felons had "an affirmative sanction" in that section and that the framers and adopters of the fourteenth amendment could not have intended to prohibit such disenfranchisement by the equal protection clause of section 1. Accordingly, the Court concluded that the disenfranchisement of convicted felons did not violate plaintiffs' right of equal protection.

Defendants contend that the instant case falls squarely within Richardson's holding that a state may distinguish between felons and nonfelons with respect to the right to vote. According to defendants, the Texas system involves only a distinction between felons and nonfelons and does not involve any distinction within the class of

persons who have been convicted of a felony. Texas law disenfranchises all persons convicted of a felony and restores to the franchise only those persons whose convictions have been abrogated, whether by executive pardon or by act of the court of conviction. The defendants argue that when a court sets aside a defendant's conviction under section 7 of art. 42.12, that individual is removed from the class of persons who have been convicted of a felony, and, as a nonfelon, he is once again eligible to vote. With this understanding of Texas law in mind, the defendants claim that plaintiffs' real grievance is with the federal government, the government which convicted them, for its failure to provide for the setting aside of convictions by federal courts. They argue that since Texas is powerless to set aside a federal conviction, successful federal probationers not pardoned by the president remain convicted felons and, under Richardson, Texas may constitutionally deny them suffrage.

The ingenuity of this argument is matched only by its disingenuousness. When a Texas court sets aside a defendant's felony conviction, that person regains the civil rights he lost as a result of his conviction. But Texas law is not so revisionist as to declare that he has never been convicted of a felony. By its own terms, section 7 of art. 42.12 provides that proof of his conviction may be presented to the court if he is subsequently convicted of a second offense.[5]

5. See n. 4, supra.

Moreover, the Texas Attorney General has ruled that a person whose conviction has been set aside cannot truthfully tell a prospective employer that he has never been convicted of a felony. See Op. Atty. Gen., 1970, No. M-640. See also Gonzalez de Lara v. United States, 439 F.2d 1316 (5th Cir. 1971) (alien convicted of Texas drug felony deportable under federal statute providing for the deportation of aliens convicted of drug offenses despite fact that Texas court had set conviction aside). Under Texas law the main distinction between felons whose convictions have been set aside and all other felons is that the former can exercise their civil rights, including the right to vote, while the latter cannot. This distinction is the very target of plaintiffs' equal protection claim.

Plaintiffs claim that Richardson means only that the state can deprive felons of the right to vote. They contend that when a state grants the right to vote to some felons and denies it to others the classifications must be judged by strict scrutiny. Plaintiffs would have us analogize their situation to that in Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), where the Court stated that although a state may constitutionally provide for the appointment of school board officials rather than their election, once it decides to fill such positions by election, the denial of the vote to any group of citizens must be tested by strict scrutiny. 395 U.S. at 628-29, 89 S.Ct. 1886. See also Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (right to vote fundamental).

We do not read Richardson to hold that the realm of state discretion in disenfranchising persons convicted of felonies is limited to the disenfranchisement of all felons or none. While a narrow reading of Richardson might support plaintiffs' position, several aspects of the Court's opinion lead us to conclude that section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the voting rights of felons. First, the Court noted that it had previously "indicated approval" of a state's disenfranchisement of "some or all convicted felons." 418 U.S. at 53, 94 S.Ct. 2655. Second, the issue before the Court was whether California could deny the vote to the class of ex-felons who had completed their sentences and paroles. See 418 U.S. at 32 n. 10, 33, 56, 94 S.Ct. 2655. Thus, although the analysis engaged in by the Court focuses on a state's power to disenfranchise persons convicted of a felony generally, the specific holding of the Court was that a state may deny the franchise to that group of "convicted felons who have completed their sentences and paroles." 418 U.S. at 56, 94 S.Ct. at 2671. Third, the Court responded to arguments that a state should reenfranchise felons once they have served their terms by saying that such arguments should be directed to the state legislatures. 418 U.S. at 55, 94 S.Ct. 2655. Thus, the Court clearly envisioned that a state could grant the right to vote to some persons convicted of a felony while denying it to others. Section 2's express approval of the disenfranchisement of felons thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect

to limiting the franchise of other citizens. In this regard it is analogous to the twenty-first amendment, which confers on the states a limited power to restrict the exercise of first amendment freedoms in places where alcoholic beverages are served. See, e.g., California v. La Rue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

[2] However, we are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote. Cf. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (first amendment does not empower states to discriminate invidiously on the basis of sex); Hobson v. Pow, 434 F.Supp. 362, 366-67 (N.D. Ala. 1977) (disenfranchisement of one class of misdemeanants struck down as arbitrary). See Note, 40 Mo.L.Rev. 130 (1975). Therefore, we conclude that selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest. See, e.g., McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

[3] A state properly has an interest in excluding from the franchise persons who

have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies. As Judge Friendly noted in Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968), such persons have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly. While such a theoretical state interest might not rise to the level of a compelling state interest, it is forceful enough to constitute a legitimate state interest.

[4] The Texas system of disenfranchising and reenfranchising convicted felons gives the state courts the power to set aside these convictions and to restore the civil rights of successful state probationers. Under this system only the court which (1) tried and convicted the defendant, (2) placed him on probation, (3) supervised him during the period of probation, and (4) discharged him from further supervision upon completion of the probationary period has the discretionary power to set aside his conviction and restore his civil rights, including the right to vote. Although, as plaintiffs suggest, Texas could have established an independent agency to review applications for reenfranchisement from both successful state and successful federal probationers, such an agency could not match the familiarity with the individual defendant and his case which the court of conviction

has.[6] Perhaps more importantly, the state could not compel the federal courts or federal probation officials to turn over information about federal probationers. Since the court of conviction is in a peculiarly advantageous position to gauge the progress and rehabilitation of a convicted felon, the classifications created by the Texas system bear a rational relationship to the state's interest in limiting the franchise to responsible voters. The judgment of the district court is therefore AFFIRMED.

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6. While this familiarity might not be significant if Texas routinely reenfranchised all state probationers, plaintiffs' complaint alleged only that ninety percent of the successful probationers in Hidalgo County are reenfranchised. Thus, the Texas courts clearly exercise some discretion.

FILED JUN 8 1976 U.S.D.C. S.D.TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CLAUDE H. SHEPHERD AND EVA CHAPA SHEPHERD V. CIRO TREVINO, TAX ASSESSOR, COLLECTOR AND REGISTRAR OF HIDALGO COUNTY; FRANK C. CHAMPION, CHIEF DEPUTY OF VOTER REGISTRATION OF HIDALGO COUNTY; AND MARK W. WHITE, JR. SECRETARY OF STATE OF TEXAS	CIVIL ACTION NUMBER 75-B-223

American Civil Liberties Union Foundation-South Texas Project (James C. Harrington) of San Juan, Texas; for the Plaintiffs.

Honorable John L. Hill, Attorney General of Texas (David M. Kendall, First Assistant Attorney General) of Austin, Texas; for the Defendant, Mark W. White, Jr., Secretary of State of Texas.

Honorable Oscar B. McGinnis, Criminal District Attorney (Tom Beery, Assistant Criminal District Attorney) of Edinburg, Texas; for the Defendants , Ciro Trevino, Tax Assessor, Collector and Registrar of Hidalgo County, and Frank C. Champion, Chief Deputy of Voter Registration of Hidalgo County.

MEMORANDUM

Claude H. Shepherd and Eva Chapa Shepherd, the named Plaintiffs, complain of Ciro Trevino, Frank C. Champion and Mark W. White, Jr. Defendants, for alleged denial of rights secured by the Fourteenth Amendment of the

United States Constitution and by the Civil Rights Act of 1871, 42 U.S.C. §1983. The Shepherds seek relief on their own behalf and on behalf of all other Texas residents similarly situated. Plaintiffs pleaded jurisdictional grounds for this action, but Defendant White purportedly challenges this Court's jurisdiction and raises other matters of which disposition must be made. In addition, Plaintiffs have filed a Motion for Prelimimary Injunction.

Claude Shepherd and Eva Shepherd, residents of Hidalgo County, were convicted of unrelated federal felony offenses; both received suspended sentences and both have subsequently been discharged from probation. Defendant Trevino is the Voter Registrar of Hidalgo County and Defendant Champion is the Chief Deputy of Voter Registration for that county; Defendant White is currently serving as Secretary of State of the State of Texas. Plaintiffs claim their Voter Registration Certificates were cancelled by Defendants on January 9, 1975.

The disparate opportunity for re-enfranchisement between federal and state ex-felons comprises the core of Plaintiffs' cause of action. Texas law governs the eligibility of all Texas citizens to vote in both state and federal elections, Plaintiffs contend, and Article VI, Section 1 of the Texas Constitution prohibits voting by "all persons convicted of any felony, subject to such exceptions as the Legislature may make." See also TEX. ELECTION CODE ANN. art. 5.01 (1967), listing classes of persons not allowed to vote in Texas, including "all persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned." Apart from executive pardon, of which both federal and state felons are potential recipients, the Texas Legislature has engrafted an additional

exception:

> "At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense." (emphasis added) TEX. CODE CRIM. PROC. ANN. art. 42.12, section 7 (1966).

Plaintiffs assert that a large percentage of state probated felons benefit from Article 42.12, Section 7, and that the absence of a similar procedure for the restoration of federal felons' voting rights constitutes a

denial of equal protection, U.S. CONST. Amend. XIV, §1. Plaintiffs also seek $11,000 in damages for the deprivation of rights guaranteed by the Civil Rights Act of 1871, 42 U.S.C. §1983; finally, injunctive and declaratory relief is requested.

In response to Plaintiffs' Complaint, Defendants Trevino and Champion filed a general denial. Joined with his answer, Defendant White submitted a Motion to Dismiss. Although certain language utilized in explication of this motion suggests that jurisdiction is at issue, a more accurate assessment of the contents is that Defendant White is moving for dismissal for failure to state a cause of action upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Secretary White acknowledges that Plaintiffs' claim, in essence, is that it is easier for state than federal ex-felons to regain their right of suffrage; yet he contends this claim is insufficient to warrant the granting of relief. In their Response to the Original Answer of Defendant Mark W. White, Jr., Plaintiffs counter that they have satisfactorily stated a claim under the equal protection clause and the Civil Rights Act of 1871. In the context of Rule 12(b)(6), the facts alleged in Plaintiffs' Complaint must be taken as established, Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 876 (C.A. 5, 1970); and, aside from this rule, the material facts are simple and beyond serious dispute. Yet, Plaintiffs' claim fails, for the Texas statutory scheme for the re-enfranchisement of State felons does not deny Plaintiffs the equal protection of the law, nor is it otherwise infirm.

In determining the justification (or lack thereof) for differing treatment, all equal protection tests and analyses probe,

at least tacitly, the extent to which complainint parties are similarly situated to the group whose benefits or privileges they seek. Yet before these tests are even applied, a fundamental similarity in circumstances is required, and such similarity is lacking here. While emphasizing their common status as ex-felons who have successfully completed probation, Plaintiff's downplay their critical distinguishing characteristic: they are federal as opposed to state ex-felons. Two separate sovereigns are involved, as well as divergent penal provisions and rules regarding probation. See, for example. Gonzales de Lara v. United States, 439 F.2d 1316, 1318 (C.A. 5, 1971). As the Fifth Circuit Court of Appeals recently observed when confronted with an analogous claim, "[t]he facts simply do not make out a case of persons similarly situated within the equal protection clause treatment requirement 'that all persons similarly circumstanced shall be treated alike'. Royster Guano Company v. Virginia, 1920, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991." Shaw v. Hospital Authority of Cobbs County, 507 F.2d 625 (C.A. 5, 1975).

Assuming, however, that Plaintiffs could satisfy the threshold inquiry above, it would then be necessary to conduct an equal protection analysis of the challenged scheme. The first step of this analysis concerns the appropriate test to be applied. In Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (hereinafter referred to as "Richardson"), the case in which the Supreme Court upheld the general enfranchisement of felons, the Respondents (ex-felons) argued that because the "fundamental" right to vote was at stake, the compelling-state-interest test applied. Unfortunately, the majority's response to this argument was less than lucid. Although the Supreme Court seemingly impliedly ruled that there was no equal pro-

tection violation, even under the compelling-state-interest-standard, Richardson, supra. at 54-55, at least one district court has opined that the decision rested solely on other grounds. Butts v. Nichols, 381 F. Supp. 573, 580-581 (Footnote 10) (S.D. Iowa 1974).

For the purposes of this discussion only, and without deciding it will be assumed that the compelling-state-interest test controls. For if this most stringent standard is met, less demanding criteria are obviously also satisfied. Relevant considerations and components of the stricter analysis consist of the following: "... the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification". Williams v. Rhodes, 393 U.S. 23, 30 (1968). See also Justice Marshall's dissent in Richardson, supra, at 56, 78. Richardson authorizes the disenfranchisement of all convicted felons, and the only question raised by Plaintiffs' claim is whether Texas' attempt to restore the voting privilege to some felons is unconstitutionally narrow. The answer is clearly no.

The exclusion from voting of only a portion of convicted felons has been approved by various courts and in various contexts. In Richardson, the Supreme Court remarked, "Although [this] Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions." (emphasis added). Green v. Board of Elections of City of New York, 380 F.2d 445 (C.A. 2, 1967), cert. denied, 389 U.S. 1048 (1968), cited approvingly in Richardson, supra, at 53, concerned a challenge to a New York statute prohibiting voting by federal felons. The Second Circuit noted that

states are not "without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies". (emphasis added). Green v. Board of Elections of City of New York, supra, at 451. See also Thiess v. State Administrative Board of Election Laws, State of Maryland, 387 F.Supp. 1038 (D.Md., 1974), where a Maryland statute barring voting by persons covincted of certain enumerated classes of offenses was upheld.

In additon, one of the "facts and circumstances" which has strongly influenced the Supreme Court in its decisions in other voting cases is absent here. In Cipriano v. City of Houma, 395 U.S. 701 (1969), a nonproperty taxpayer successfully challenged a Louisiana law which permitted only "property taxpayers" to vote in electios called to approve the issuance of revenue bonds by a municipal utility. In striking down that statute, the Supreme Court emphasized that it contained "a classification which excludes otherwise qualified voters...", Cipriano v. City of Houma, supra, at 706. As is readly apparent, the Plaintiffs in the instant case are not "otherwise qualified voters", and their interests are accordingly of substantially diminished import.

Furthermore, the statutory scheme enacted in Texas (in particular, Section y of Article 42.12) serves a legitimate and compelling state interest. Section 7 is intricately interwoven with the Texas Code of Criminal Procedure; it is not a mere isolated or automatic re-enfranchisement statute. The power to release a defendant from "all penalties and disabilities" is invested in the State courts of record which have original criminal jurisdiction. TEX. CODE CRIM. PROC. ANN. art. 42.12, Section 2a (1966). And, as the wording of Section 7 indicates, the Court possesses considerable discretion in deciding whether or not to grant such a release. It is

important, too, to examine the express purposes of article 42.12, which are stated in Section 1:

> "It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of probations and paroles in the public interest." TEX. CODE CRIM. PROC. ANN. art. 42.12, Section 1 (1966).

It is abundantly apparent that Section 7 fulfills a proper policy interest: the Trial Court, the institution responsible for the Defendant from the initiation of criminal proceedings until their termination, is charged with making a case-by-case review and restoring the rights of those deemed deserving. (A provision similar to article 42.12, Section 7, was part of the challenged statutory scheme in Richardson, supra. at 30.)

It is also manifest that the Texas "classification" "does not exclude too many people who should not and need not be excluded", nor are there "other reasonable ways to achieve the state's goal with a lesser burden on the constituitonally protected interest." Richardson, supra, at 78 (dissenting opinion). A State court could not perform an adequate and comparable ministration for federal felons as it now performs for state felons under Section 7; nor could federal courts be compelled do discharge this state function. The Texas Legislature could have established a panel independent of the courts to review both state and federal cases. Or, the Legislature could have provided that all felons, both state and federal, be automatically re-enfranchised upon satisfactory fulfillment of the terms of probation and the expiration of the probationary period. However, these alternatives are candidates for legislative, not judicial, consideration. Richardson, supra, at 55.

Justice Marshall dissented in Richardson largely because of a sentiment that the exclusion of all felons was impermissible: "I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand". Richardson, supra, at 86 (dissening opinion). Despite the absence of an obligation to do so under the majority holding in Richardson, Texas has sought to respond to the precise criticism raised by Marshall. The procedure which was enacted, Article 42.12, Section 7, alone and in conjunction with other statutory and constitutional provisions, does not deny Plaintiffs equal protection of the law.

Defendant Mark White's Motion to Dismiss will be granted. In view of this ruling, it is not necessary to pass upon Plaintiff's Motion for Preliminary Injunction or any other pending matters.

To avoid all possibilities of confusion, this Court emphasizes that its ruling in this cause is both final and upon the merits. Ballou v. General Electric Company, 393 F. 2d 398, 399-400 (C.A. 5, 1968), cert. denied, 401 U.S. 1009 (1971); Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F. 2d 172, 174 (C.A. 6, 1968). By Order of even date, Plaintiffs' Complaint against all Defendants will be dismissed and dropped from the docket of this court.

The Clerk will send copies of this Memorandum and the Order to counsel for the parties.

DONE at Brownsville, Texas, this 8th day of June, 1976.

Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-3258

CLAUDE H. SHEPHERD AND EVA CHAPA SHEPHERD,

Plaintiffs-Appellants,

versus

CIRO TREVINO, Tax Assessor, Collector and Registrar of Hidalgo County, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before CLARK and GEE, Circuit Judges, and LYNNE,* District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgement of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 30, 1978

Issued As Mandate: SEP 5 1978

* Senior District Judge of the Northern District of Alabama, sitting by designation.

FILED 8/25/78 COURT OF APPEALS 5th Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76- 3258

CLAUDE H. SHEPHERD and EVA CHARA SHEPHERD,

Plaintiffs-Appellants,

versus

CIRO TREVINO, Tax Assessor, Collector and Registrar of Hidalgo County, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

ON PETITIONER FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: CLARK and GEE, Circuit Judges, and LYNNE,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States District Judge

* Senior District Judge of the Northern District of Alabama, sitting by designation.

IN THE _____ DISTRICT COURT

HIDALGO COUNTY, TEXAS

THE STATE OF TEXAS	I	CAUSE NO. _____
VS.	I	ORDER DISCHARGING DEFENDANT FROM FELONY PROBATION
_____	I	

On this _____ day of _____, 19__, the Court, on its own motion, having reviewed the proceeding in the above styled and numbered cause, in which defendant herein was heretofore placed on probation under the Adult Probation and Parole Law of the State of Texas.

It appearing to the Court that said defendant has paid all costs of _____ trial and all fines assessed against _____ in said cause and has complied with the terms and conditions of _____ said probation; and it further appearing to the Court that the period of probation has expired in said cause and that the Defendant herein is entitled to be discharged from probation.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, that the finding of guilty heretofore entered in said cause be, and the same is hereby set aside, that the indictment in said cause be, and the same is hereby dismissed, and that the Defendant herein be and is hereby discharged from probation as of the _____ day of _____, 19__.

It is further Ordered that the defendant be and he is hereby released from all penalties and disabilities resulting from the offense or crime of which he was convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

APPROVED AS TO FORM:

_____
Asst. Criminal District Attorney
Hidalgo County, Texas

_____
Chief Adult Probation Officer
Hidalgo County, Texas

_____
Judge of the _____ District Court
Hidalgo County, Texas

SIGNED: ___ DAY OF _____, 19__.

Supreme Court U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-841

* * *

CLAUDE H. SHEPHERD, and
EVA CHAPA SHEPHERD,

Petitioners

V.

CIRO TREVINO, FRANK C. CHAMPION,
and MARK W. WHITE,

Respondents

* * *

RESPONSE OF MARK W. WHITE, ONE OF THE RESPONDENTS, TO THE PETITION FOR A WRIT OF CERTIORARI

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-841

* * *

CLAUDE H. SHEPHERD, and
EVA CHAPA SHEPHERD,

Petitioners

V.

CIRO TREVINO, FRANK C. CHAMPION,
and MARK W. WHITE,

Respondents

* * *

RESPONSE OF MARK W. WHITE, ONE OF THE RESPONDENTS, TO THE PETITION FOR A WRIT OF CERTIORARI

* * *

Mark W. White, one of the Respondents, respectfully files this response to the Petition for a Writ of Certiorari. Subsequent to the entry of the judgment of the United States District Court on June 8, 1976 but prior to either judgment of the Court of Appeals on June 30, 1978 and October 25, 1978, respectively, White resigned to become a candidate for Attorney General of the State of Texas in which candidacy he was successful. As of January 1, 1979 he will be the Attorney General. Although, according to article 1.03 of Vernon's Texas Election Code, Mr. White, as Secretary of State, was the chief election officer of Texas at the time this suit was filed and decided in the district court, he no longer has any direct responsibility as to the enforcement of the

laws which Petitioners challenge and is presently a proper party to this suit only because Petitioners have sought recovery of damages from him.

This Respondent, in his answer filed in the district court, urged as a defense his immunity from suit as an official of the State of Texas. Petitioners do not address that question and yet it is critical in view of Respondent's present status. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *Procunier v. Navarette*, 98 S.Ct. 855 (1978).

CONTEST OF JURISDICTION

Although Rule 23(1)(g) of the Supreme Court Rules required Petitioners to include a statement of the basis of federal jurisdiction in the district court, and even though this Respondent challenged the district court's jurisdiction, Petitioners fail to mention jurisdiction of the district court or, for that matter, of this Court as required by Rule 23(1)(b)(iii), Supreme Court Rules.

In Plaintiffs' original complaint jurisdiction was alleged under sections 1331, 1343, 2201 and 2202 of Title 28 U.S.C. The motion to dismiss, found as the first paragraph of this Respondent's answer, asserted lack of jurisdiction of the subject matter because the complaint failed to state facts giving rise to any cause of action under the Constitution or laws of the United States within the Court's jurisdiction under section 1331; because the complaint failed to state any right, privilege or immunity of the Petitioners secured by the Constitution of the United States allegedly violated by this Respondent and, therefore, there was no cause of action stated under section 1343; because neither section 2201 nor 2202 provides jurisdiction, each requiring jurisdiction in the court on some other basis as a prerequisite to the granting of declaratory relief; because there was no diversity of citizenship between

the parties; and because no other ground of jurisdiction appeared from the complaint.

In their "Response to the Original Answer of Defendant Mark W. White, Jr.," Petitioners stated that the complaint did state a cause of action under the Constitution and laws of the United States "particularly the Fourteenth Amendment, to-wit: Defendants have denied Plaintiffs the right to vote solely because they have been probated by this Federal court," in that Petitioners' right to vote without being subjected to arbitrary or irrational limitations and their right to substantive and procedural due process were violated; in that their right to equal "probation of the law" in not being denied their franchise. As Plaintiffs' complaint seems to recognize, their cause of action, if any, must be under the Fourteenth Amendment. They ignore the fact, however, that the Fourteenth Amendment, in its section 2, specifically sanctions limitations on the right to vote for participation in crime. This was the very basis of the Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). Therefore, a complaint filed by or on behalf of persons convicted for participation in crime and asserting a constitutional right to vote does not state a violation of any protected constitutional right and is outside the jurisdiction of the United States District Court when jurisdiction is asserted on either section 1331 or section 1343 of Title 28.

QUESTIONS PRESENTED FOR REVIEW

The only question presented in this case is whether the Texas constitutional and statutory provisions that those persons convicted of a felony are ineligible to vote are made unconstitutional by the fact that Texas has adopted a procedure whereby persons convicted of felonies and given probated sentences, upon the successful completion of their period of probation, *may* be restored to full citizenship and the right of suffrage.

Although Petitioners throughout their petition would make it seem that the Texas statute distinguishes between persons convicted in Texas and restored by Texas courts, on the one hand, and persons convicted in other jurisdictions and restored in those other jurisdictions, that simply is not true. A person convicted in the federal courts and granted a pardon may be registered as a voter and a person convicted in another state and either subjected to a procedure such as that of article 42.12, section 7 of the Texas Code of Criminal Procedure, pardoned or in some other way restored to full citizenship by the jurisdiction which convicted him, may vote.

The *Ramirez* case, supra, establishes the validity of so much of Article VI, section 1, of the Texas Constitution, and article 5.01 of Vernon's Texas Election Code, as exclude felons from the vote. Thus, all that is in question is the provision that those excluded may be restored to the right to vote by having full citizenship and the right of suffrage restored or by being pardoned. (We assume that if the federal laws did not provide for a pardon, Petitioners would question that part of article 5.01, Vernon's Texas Election Code, which authorizes the vote to those who are pardoned under Texas law).

STATEMENT OF THE CASE

As Petitioners note (and as was recognized by the district court) this is an appeal from an order of dismissal based upon the pleadings, and, therefore, the factual allegations of Petitioners' complaint must be taken as true. The statement of the case, as found in the petition for certiorari, however, attempts to change those facts. Petitioners alleged in their complaint (Paragraph XXV):

> Ninety percent of all individuals placed on probation in Hidalgo County, after being convicted of a felony in the Texas state courts, upon successful completion of probation, regain their civil rights, including the right to vote, using the above procedure.

In their brief filed as Appellants in the Court of Appeals (p. 5) Petitioners alleged:

> Through Article 42.12, Section 7, of the Texas Code of Criminal Procedure ninety percent (90%) of all individuals in Hidalgo County convicted of a felony in Texas state courts, who are successful probationers, regain their right to vote . . ..

The Court of Appeals in its opinion (Petition for Certiorari, p. 5a) referring to these contentions, said:

> Plaintiffs contend that ninety percent of the successful state probationers in Hidalgo County are reenfranchised by the court in which they were convicted.

Petitioners, in their petition for rehearing and suggestion for rehearing en banc filed in the Court of Appeals did not except to that construction of the record but rather agreed with it, saying in Footnote 2 on page 5:

> The Shepherds' allegation that 90% of successful probationers in Hidalgo County are reenfranchised certainly approaches the "routineness" sought in Footnote 6 to this Court's opinion . . .. The record does not indicate which 10% are not reenfranchised (perhaps only second or third-time probationers). Nor does the record indicate what percentage of successful probationers apply for the franchise (which is the heart of the Shepherds' claim) but are among the 10% denied . . ..

Now, for the first time, Petitioners would assert and have this Court believe that the allegation really means that 90% of all probationers successfully complete their probation and that of that 90% all are routinely reenfranchised (Petition, p. 5-6 and Fn. 2, pp. 6-7). Parenthetically, the "form order" to which reference is made in Footnote 2, at p. 7, and which is appended to the petition at p. 26a is a document which we have never seen before, is not in the record and is not properly before the Court.

We would also add to the Statement of the Case as it appears in the petition that the prayer of Petitioners' complaint was that the district court enter its judgment certifying this action as a class action; declaring that article 5.01(4) of the Texas Election Code and article 42.12, section 7, Vernon's Texas Code of Criminal Procedure, operating together, violate the guarantee of equal protection of the United States and Texas Constitutions; alternatively, that the lack of a provision for a procedure similar to article 42.12 applicable to felons convicted and probated under federal law violated the guarantee of equal protection; granting preliminary and permanent injunctions restraining Respondents from denying voter registration to Petitioners and their class due to past felony convictions; granting Petitioners judgment in the amount of $11,000 actual damage; retaining jurisdiction to ensure compliance and granting Petitioners their costs. In their response to this Respondent's answer, however, Petitioners said:

> Plaintiffs have not prayed that the Court declare Article 42.12, Section 7, of the Texas Code of Criminal Procedure unconstitutional.

NO REASON EXISTS FOR GRANTING A WRIT OF CERTIORARI

No special or important reason exists for the exercise

of this Court's discretion and granting of the writ of certiorari. Rule 19(1)(b) of the Rules of the Supreme Court states guidelines which "indicate the character of reasons" that this Court will consider in making that determination. Apparently Petitioners rely on that part which states that among the reasons that will be considered is

> Where a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . .

They cite *O'Brien v. Skinner*, 414 U.S. 524 (1974); and *Carrington v. Rash*, 380 U.S. 89 (1965). It may be significant that neither of these decisions was cited by Petitioners in the district court or the court of appeals and the arguments presented by Petitioners as reasons for granting the writ are arguments not urged before the lower courts and upon which the lower courts have not expressed themselves.

Be that as it may, neither case conflicts with the decision of the Court of Appeals. *O'Brien* dealt with the right of persons detained in the county jail of the county of their residence and awaiting trial or serving misdemeanor sentences to vote absentee, denied by the New York statute, as compared to similar detainees in counties other than the county of their residence who were permitted to vote absentee. The qualification of the detainees as voters was not in question. The Court said:

> . . . Appellant and others similarly situated are, as we have noted, under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote.

(414 U.S. at 530).

In *Carrington v. Rash* the question was whether the State of Texas could deny to residents of the state otherwise qualified to vote the right to vote merely because they were military personnel.

Neither *O'Brien* nor *Carrington* dealt with the right of the State of Texas to except from its general, constitutional denial of the franchise to convicted felons those who had been found by a court to be proper candidates for having their civil rights restored. Thus, the conflict upon which Petitioners would predicate this Court's exercise of its discretion to grant a writ of certiorari simply does not exist.

Petitioners complain because a felony, under Texas law, differs from a felony under federal law. There are many differences between federal criminal law and Texas criminal law. The jurisdictions of the courts differ. The procedures differ. The possible ranges of punishment differ. The places of punishment are different. The provisions for probation are different. The rights to a pardon differ. Apparently, Petitioners would have the Court find that the Texas constitutional inhibitions on those who may vote can only be applied to persons convicted under statutes, procedures and circumstances identical to those under which Texas felons might be convicted.

As we have previously noted, Petitioners would change the facts upon which the motion to dismiss was sustained and substitute new facts with reference to what percentage of those convicted of felonies were given probated sentences, how many of them successfully completed their probation, and how many of those successfully completing probation were released from all penalties and disabilities resulting from their conviction under article 42.12, section 7, of the Texas Code of Criminal Procedure. They also would have the Court believe that only a felon released of the

penalties and disabilities resulting from his conviction under that article, that is under Texas law, could enjoy the provisions of article 5.01 of the Election Code. There is no law to support this contention and the article certainly is subject to the interpretation that any convicted felon, whether convicted in Texas or elsewhere, who through some procedure of the convicting jurisdiction is restored to full citizenship and the right of suffrage may exercise those rights in Texas if he meets the other requirements of citizenship.

The petition for certiorari makes no mention of the relief sought here. The relief sought by the complaint is vague and indefinite and understandably so. Petitioners say they do not question the constitutionality of article 42.12, section 7. Surely they don't question the constitutionality of article 5.01 of the Election Code--they seek to take advantage of its provisions. What, then, *is* the relief which they seek? Several alternatives seem to be available.

If Petitioners are correct, then the Court could equalize the treatment of convicted felons by striking down that portion of article 5.01 which would permit certain convicted felons who had successfully completed their period of their probation and had been released from the penalties of their conviction under article 42.12, section 7, to vote. Or, the Court could order that, somehow, the Texas state courts would administer the federal probation system and perform for federal felons the function they now perform for state felons. Or, the Court could order that the federal courts apply the state procedures of article 42.12, section 7, to federal felons. Or, the Court could order establishment of a panel, independent of the courts, to review both state and federal cases and determine which convicted felons would be released of the penalties of their conviction. Or, the Court could order that all felons, both state and federal, be automatically reenfranchised upon

satisfactory fulfillment of the terms of probation without reference to other factors which might now bear upon the application to them of section 7. All of these were considered by the district court in its memorandum and order (Petition for Certiorari, p. 22a) and rejected by it as being properly subject to legislative and not judicial consideration. These were also considered in the opinion of the Court of Appeals (Petition for Certiorari, pp. 12a-13a) and rejected by it.

Assuming that even Petitioners will not urge that the purpose of the Texas scheme for reenfranchising certain ex-convicts is bad in principle, then it seems that no purpose is to be served by this Court granting a writ of certiorari to review that scheme.

For the foregoing reasons, Respondent Mark White respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response of Mark W. White, One of the Respondents, to the Petition for a Writ of Certiorari has been placed, postage prepaid, in the United States First Class Mail on this the ___ day of December, 1978 addressed to the following:

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Union Foundation -
South Texas Project
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DAVID M. KENDALL

Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-841

CLAUDE H. SHEPHERD and EVA CHAPA SHEPHERD,

Petitioners,

—v.—

CIRO TREVINO, Tax Assessor, Collector and Registrar of Hidalgo County, Texas, *et al.*,

Respondents.

REPLY TO RESPONDENT SECRETARY'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-841

CLAUDE H. SHEPHERD and
EVA CHAPA SHEPHERD,

Petitioners,

vs.

CIRO TREVINO, Tax Assessor,
Collector and Registrar of
Hidalgo County, Texas,
et al.,

Respondents.

******

REPLY TO RESPONDENT SECRETARY'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE FIFTH CIRCUIT

******

INTRODUCTION

Claude and Eva Shepherd, Petitioners for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, file this brief in reply to the Response of Texas Secretary of State Mark W. White, Jr., one of the Respondents, to their petition for certiorari. Respondent White is referred to herein as "the Secretary".

JURISDICTION

Although the jurisdictional basis for the Writ of Certiorari is clear from the Petition as a whole, the following separate statement of jurisdiction was inadvertently omitted when the Petition was printed:

> The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1978. A timely Petition for Rehearing and Suggestion for Rehearing en Banc were denied on August 25, 1978 (579 F2d 643); and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

In the District Court, the Petitioners stated that their claim arose under the Equal Protection Clause of the Fourteenth Amendment and that they brought their action pursuant to 42 USC §1983, alleging jurisdiction under 28 USC §§1331 and 1343.

This jurisdictional basis is fully recognized and discussed by the Secretary in "Contest of Jurisdiction" in his Response (pages 2 and 3).

REPLY TO RESPONDENT SECRETARY'S DENIAL THAT REASONS EXIST FOR GRANTING A WRIT OF CERTIORARI

A. Respondent Mark White Was Sued In His Official Capacity as the Secretary of State of Texas.

The style of this case throughout the course of this litigation clearly shows that the three Respondents are sued only in their official capacities. The Original Petition in District Court described the Respondents solely in terms of their official capacities. Mark

White was sued as the Secretary of State because, as such, he was the chief election officer of Texas.

After the appeal was in process, Mark White resigned as Secretary of State and is now the Attorney General-elect of Texas. Steven C. Oaks replaced White. However, since White was sued as a public officer, his successor in office is automatically substituted for him.

Federal Rule of Appellate Procedure 43(c) provides that, when a public officer is a party to litigation in his official capacity and ceases to hold office, his successor is automatically substituted and "any misnomer not affecting the substantial rights of the parties shall be disregarded". Further, "the omission to enter [an] order of substitution...shall not affect the substitution".

Indeed, at oral argument before the Fifth Circuit on January 23, 1978, Respondents' counsel had no problem substituting Steven Oaks for

his predecessor Mark White. No claims of individual immunity or capacity were raised on appeal or at oral argument.

The present Secretary serves only until January 16, 1979, having been appointed by the Democratic Governor, who leaves office on January 16. He will most likely be replaced by the in-coming Republican Governor. In fact, Secretary Oaks has publicly accepted a position as a law professor at Texas Southern University in Houston.

Petitioners respectfully request the Court to enter an order, substituting Steven C. Oaks in place of Mark W. White, Jr., as the Respondent Secretary. Along with this Reply Brief, Petitioners are filing a motion to effect the substitution.

If Secretary Oaks himself leaves office, Petitioners will move the Court to substitute his successor.

B. Damages Are Not Sought Against Any Respondent.

Although the Original Petition sought damages of $11,000 from Respondents, that claim was completely abandoned on appeal and has never been urged.

The relief sought on appeal, as stated in Appellants' [Petitioners'] Brief (page 23), was to "remand this cause to the District Court with instructions to order Defendants to reenfranchise Plaintiffs". Cf. also Appellants' Reply Brief (page 8).

The only other relief discussed on appeal was framing appropriate injunctive relief for the class.

Thus, the Secretary's reliance on Scheuer v. Rhodes, 416 US 232 (1974), Wood v. Strickland, 420 US 308 (1975), and Procunier v. Navarette, 434 US 555 (1978), is misplaced.

C. Judicial Relief Is Possible In This Case And Petitioners And Their Class Are Entitled To That Relief.

The Secretary argues that Petitioners' relief rests in the Texas legislature, rather than in the courts.

That argument is particularly faulty in this case.

After the appeal was filed herein but before oral argument, several bills were introduced in the Texas Senate during the 1977 legislative session which would have re-enfranchised Petitioners and their class. However, none of those bills were enacted.

Petitioners requested the Court of Appeals, pursuant to Federal Rule of Evidence 201, to judicially notice the above facts and the efforts of their attorney to secure a legislative solution to this case. Copies of the proposed legislation and the attorney's correspondence with state legislators were provided to the

Appeals Court and to Respondents' counsel.

Presumably, the Court of Appeals did take judicial notice since those matters were discussed thoroughly during oral argument.

Judicial relief can be formulated in this case, without the complicated procedures envisioned by the Secretary.

For example, as indicated in the Conclusion of the Petition for Certiorari, Respondents could be enjoined from denying the franchise to those who are otherwise qualified to vote and who are:

1. Texas residents and successful federal felony probationers, including those probated of a felony offense
   a. which is not a felony under Texas law, and/or,
   b. for which punishment was not equivalent to a felony sentence under Texas law; or,
2. successful felony probationers in another state who are or thereafter become Texas residents, including those who are successfully probated of a felony offense

   a which is not a felony in Texas, and/or
   b. for which the punishment was not equivalent to a felony sentence in Texas, and/or,
   c. who are reenfranchised under the laws of the state which convicted them.

Other relief or a modified version of the above is possible; but, because this case arose on the grant of a motion to dismiss, Petitioners have never had an opportunity to thoroughly explore appropriate relief.

The Secretary also argues that O'Brien v. Skinner, 414 US 524 (1974), and Carrington v. Rash, 380 US 89 (1965), do not restrict Texas' ability to re-enfranchise under Section 2 of the Fourteenth Amendment.

However, those cases were cited to show that, as the Court of Appeals recognized (page 11a, Petition for Certiorari), some rational test must apply where voting rights are at issue, even when a state can legitimately limit those rights (such as under Section 2).

Carrington v. Rash held that Texas could not deny the vote to resident military personnel who were otherwise qualified to vote. Carrington clearly means that the Texas re-enfranchisement scheme cannot irrationally and arbitrarily penalize the right to travel into and take up residence in Texas by permanently denying the franchise to those convicted, but absolved, of felonies outside of Texas. It is likewise arbitrary and irrational to require that, if successful federal probationers in Texas ever want to vote for their federal or state representatives, they must leave Texas and take up residence in a state which permits even-handed re-enfranchisement.

D. No Re-enfranchisement of Successful Out-of-State Probationers.

The Secretary denies that the Texas re-enfranchisement "statute distinguishes between persons convicted in Texas and restored by Texas courts, on the one hand, and persons convicted in other jurisdictions and restored in those other jurisdictions" (page 4, Response of Mark White).

Nothing in the record supports that denial; and the Secretary failed to substantiate his denial with any Texas court case, Attorney General's opinion, or even a formal directive or instruction which he has the responsibility to issue under Article 1.03(1), Vernon's Annotated Texas Election Code.

If anything, Article 42.12, Section 7, of the Texas Code of Criminal Procedure on its face forces such a distinction. It clearly provides a re-enfranchisement scheme only for those probated in Texas state courts.

Again, because this case arises on the grant of a motion to dismiss, Petitioners have not had an opportunity to offer proof on the scope of the procedures applied to federal and out-of-state successful probationers.

E. Routine Re-enfranchisement in Hidalgo County.

The Secretary also disputes the routine re-enfranchisement of successful state probationers in Hidalgo County, relying on the confusing phrasing of Paragraph XXV of the Original Complaint and the construction applied to it by the Court of Appeals.

The Appeals Court understood Paragraph XXV to allege that 90% of successful state probationers are re-enfranchised in Hidalgo County.

However, Paragraph XXV should be understood to allege that 90% of the state probationers in Hidalgo County are successful and all those who are successful are routinely re-enfranchised. This reading is consistent with Paragraphs XXVI and XXIX of the Complaint and Petitioners' Affidavit in Support of Motion for Preliminary Injunction (which the Secretary overlooks), which claims that, had Petitioners been probated in the Texas system, they would

have been routinely re-enfranchised.

When the Secretary cites Footnote 2 of the Petition for Rehearing and Suggestion of Rehearing en Banc, he omits that part which asserts routine re-enfranchisement:

> Because this appeal is on a successful Rule 12(b)(6) motion, the Shepherd's claim that "Texas citizens convicted of felonies under state law...generally... have their right to vote restored" must be credited....

The Secretary makes a similar omission in citing Petitioners' appellate brief. The second sentence after the Secretary's citation from page 5 of Appellants' Brief reads:

> Had [Petitioners] been convicted and probated in the Texas system, their right to vote would have been automatically restored....

Cf. also pages 11-12 and 19 of Appellants' Brief and page 4 of Appellants' Reply Brief.

F. Service on Respondents

Petitioners attempted to serve their Petition for Certiorari on Respondent Tax Asses-

sor and on Respondent Chief Deputy of Voter Registration when the Petition was filed by serving the First Assistant Attorney General of Texas who had represented all Respondents at oral argument and acted as lead counsel, as noted in the appellate opinion (575 F2d at 1111):

> John L. Hill, Atty. Gen. of Tex., David M. Kendall, First Asst. Atty. Gen....for defendants-appellees [Respondents].

However, service may not have been perfected until December 26, 1978, because the First Assistant Attorney General responded only on behalf of the Secretary. To assure that service was perfected, copies of the Petition were immediately served on the Acting Criminal District Attorney of Hidalgo County for the other two Respondents on December 26, since the District Attorney had nominally represented both those Respondents in the District Court.[1]

CONCLUSION

The reasons advanced by the Secretary for not granting the Petition for a Writ of Certiorari are without merit. None of his arguments alter the validity of the reasons set forth in the Petition.

Wherefore, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing Reply Brief to the Response of Mark W. White, One of the Respondents, to the Petition for a Writ of Certiorari has been placed, postage prepaid, in the United States First Class Mail, on this 3rd day of January, 1979.

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